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## Restorative Justice For The Victims Of School Bullying: How Far Does The Law Go?

John Paul  
CUNY Brooklyn College, john.paul@brooklyn.cuny.edu

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**RESTORATIVE JUSTICE  
FOR THE VICTIMS OF SCHOOL BULLYING:  
HOW FAR DOES THE LAW GO?**

by

John Paul\*

**I. INTRODUCTION**

Beyond its effect on individual students, bullying has a profound effect on the entire educational community. Recognizing the wide impact of bullying on the educational environment, the U.S. Court of Appeals for the Fourth Circuit observed that schools have an obligation to protect their students from harassment and bullying in the school environment, an obligation that outweighs free speech concerns.<sup>1</sup>

The extent of a problem can arguably be measured by how much attention it receives from society in general. Using this attention measurement, bullying is a problem of monumental proportions.<sup>2</sup>

School bullying formerly had not received much attention from policy-makers, scholarly researchers or the general public.<sup>3</sup> Recently, however, a great deal of attention has focused on school bullying as several cases of student suicide have garnered national media coverage.<sup>4</sup> A 2012

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\* Clinical Assistant Professor of Accounting/Legal Studies and Taxation, Lubin School of Business, Pace University, New York, NY

documentary film called *Bully* follows the lives of five students who were bullied and two of these students killed themselves.<sup>5</sup> Numerous programs and websites focus on the problem of bullying.<sup>6</sup> The news media regularly reports on bullying incidents, such as the Tyler Clementi (Rutgers University student) suicide and the recent conviction of his roommate. Celebrities have prominently campaigned against it.<sup>7</sup>

The federal government has also become involved in the problem of bullying. In 2010, six federal departments, including the U.S. Department of Education and the U.S. Department of Health and Human Services, held the first-ever National Bullying Summit to bring together, national, state, local, civic and corporate leaders to create a strategy to end bullying.<sup>8</sup> Then, in 2011, President Barack Obama and First Lady Michelle Obama convened the White House Conference on Bullying Prevention.<sup>9</sup> They launched a website to raise funding to combat bullying: [www.stopbullying.gov](http://www.stopbullying.gov).<sup>10</sup>

Despite the media and political attention being paid to the problem, bullying persists. According to a 2010 survey conducted by the Josephson Institute Center for Youth Ethics, 47 percent of the 43,321 students surveyed reported being bullied (taunted, teased, and/or physically abused) and about 50 percent reported bullying others.<sup>11</sup> A more detailed breakdown of bullying behavior is provided by the School Crime Supplement (SCS) to the National Crime Victimization Survey. According to the SCS, 21 percent reported that they had been called names, insulted or made fun of by others; 18 percent revealed that they had been the subject of rumors; 11 percent stated that they had been pushed, shoved, tripped or spit on; 6 percent said that they had been threatened with harm; 5 percent felt they had been left out of activities on purpose, and 4 percent reported that their property was destroyed and that others had coerced them to do things they did not want to do.<sup>12</sup>

Bullying is not a new problem and many adults today were probably bullied in one form or another. Access to cell phones and the Internet, however, has made bullying much worse as “the Internet has provided young people with an arsenal of weapons for social cruelty.”<sup>13</sup> As Rutgers University Dean Richard Ludescher stated, “.....part of what’s out there on the Internet is the Wild West. An entire generation is growing up on the Web.”<sup>14</sup> The prominence of bullying that occurs on the Internet, known as cyberbullying, indicates that the schoolyard bully has gone digital.<sup>15</sup>

Before the Internet, the victims of bullies could find respite when there was no school session or when they weren’t forced to be face-to-face with their tormentors. In many cases, bullies became bored and moved on to new targets. With cyberbullying, victims are no longer able to escape the bullying when they leave school; the torment follows them wherever they are when the cruel comments are posted on the Internet. Once a comment or video is posted, it is online, possibly forever, for everyone in the world to see. These comments or videos may haunt them for the rest of their lives. Anyone who does an Internet search may be able to locate these hurtful comments and this may affect the victims’ personal and professional relationships over their lifetimes.<sup>16</sup> As the use of the Internet advances, especially among young people, and as social networking sites continue to grow exponentially, cyberbullying can be expected to substantially increase in the future.<sup>17</sup>

The sheer magnitude of bullying has serious implications for both the victims of bullying and the bullies themselves. Research findings over a 15-year time period indicate that bullies and the victims of bullying are at risk for short-term and long-term academic problems, psychological

difficulties and social relationship problems.<sup>18</sup> Specifically, bullying victimization was found to be linked to avoidance behavior, depression, illness, low self-esteem, poor academic performance, aggression and violence including carrying a weapon and fighting as well as suicidal thoughts and attempts. For bullies, their behaviors were found to be linked to later delinquency and criminality.<sup>19</sup>

This article will analyze the legal system's approach to holding elementary, secondary and collegiate schools liable for cyberbullying in relation to the First Amendment. It will conclude that the legal system must: (1) recognize that there is a difference between valuable, constitutionally-protected political speech and worthless, unprotected bullying speech; and (2) hold schools liable for bullying-related injuries especially in cases where schools exercise control and have undertaken a duty.

## **II. BULLYING AND SPEECH IN SCHOOLS: FIRST AMENDMENT RIGHTS**

Antibullying policies involve a number of constitutional issues. Although there are various definitions of bullying, the common thread among all of the definitions is a communication or physical act of some form that adversely affects a student. When the form of bullying is expressed by words or other forms which are non-physically threatening, the First Amendment is always a factor influencing the action that a government can take in response to that bullying.<sup>20</sup> The cases which follow do or can shed light on the bullying/free speech relationship.

### A. *Tinker*

The first major case to address a student's right to free speech in a school setting was *Tinker v. Des Moines Independent Community School District*.<sup>21</sup> *Tinker* involved a group of students who objected to the Vietnam War and showed their support for a truce by wearing black armbands in school.<sup>22</sup> The principal objected and announced that any student who wore an armband would be asked to remove it and would be suspended if the student failed to comply.<sup>23</sup> Several students continued to wear the armbands and were suspended as a result. The students sued the school on First Amendment grounds. In its decision, the U.S. Supreme Court said, "that it can be hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>24</sup> The Court stated that in order for free speech to be curbed, there must be a substantial disruption or material interference with school activities.<sup>25</sup>

The lower courts have yet to focus any attention on the portion of the *Tinker* decision which authorizes school officials to curb the speech of students if that speech "involves.....invasion of the rights of others."<sup>26</sup> Since cyberbullying often affects the rights of others, it will be interesting to see if the phrase *invasion of the rights of others* takes on heightened significance in the evolving jurisprudence of school bullying.

### B. *Bethel*

The next significant case to build upon *Tinker* involved a student's use of profanity at a school assembly.<sup>27</sup> In *Bethel School District vs. Fraser*,<sup>28</sup> Fraser delivered a nomination

speech at a school assembly, which 600 students attended. Fraser used explicit sexual metaphors to describe his candidate throughout his speech.<sup>29</sup> After the speech, the school suspended Fraser and removed him from the list of candidates who would deliver the graduation speech.<sup>30</sup> Fraser sued the school claiming that the school violated his First Amendment right to free speech.<sup>31</sup> Upon review, the U.S. Supreme Court found that the school had the absolute authority “to prohibit the use of vulgar and offensive terms in public discourse”<sup>32</sup> and that allowing the student to speak in such a lewd manner would “undermine the school’s basic educational mission.”<sup>33</sup> The Court distinguished between speech uttered in school and speech uttered outside of school when it asserted that “Matthew Fraser could have given his salacious speech outside of the school and could not have been penalized simply because government officials considered his language inappropriate.”<sup>34</sup>

It can be argued that *Bethel* may be used to defend certain acts of cyberbullying on the grounds of free speech if the cyberbullying took place outside of the school. In fact, the Third Circuit recently rejected a school district’s attempt to use *Bethel* as the basis for its punishment of a student who created a fake MySpace profile of his high school principal. In *Layshock v. Hermitage School District*,<sup>35</sup> the school district argued that the MySpace profile was “unquestionably vulgar, lewd and offensive” and therefore unprotected by the First Amendment when it wound up in the school community.<sup>36</sup> While the Third Circuit had previously held that “a school may categorically prohibit lewd, vulgar or profane language,”<sup>37</sup> the court clarified this opinion by stating that this prohibition applied only when the speech was given “inside *Tinker*’s schoolhouse gate.”<sup>38</sup> Since the student’s speech did not create any substantial disruption in school, the Third Circuit concluded that it never made it through the schoolhouse gate.

### *C. Hazelwood*

The next substantial case to reach the U.S. Supreme Court regarding students' First Amendment rights in a school environment involved student editors of the school newspaper.<sup>39</sup> In *Hazelwood School District v. Kuhlmeier*,<sup>40</sup> the school principal deleted two pages from the school newspaper.<sup>41</sup> The deleted pages contained information about specific instances of student pregnancies, as well as potentially damaging details about a student's parents who recently divorced. Although the names of the students were changed in the article, the principal felt that the readers would still be able to identify them. The student editors sued the school, claiming that their First Amendment rights were violated.<sup>42</sup> The Supreme Court held that the high school newspaper did not qualify as a public forum and this allowed school officials the right to impose reasonable restrictions on student speech in the newspaper. The Court concluded that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities as long as their actions are reasonably related to legitimate pedagogical concerns."<sup>43</sup>

Since the newspaper was distributed to the educational community, the Court differentiated between the *Tinker* standard and the situation in *Hazelwood*, which required a higher degree of control over student speech. The Court stated that a school must be able to set high standards for student speech that is disseminated under its auspices and that these standards may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world.<sup>44</sup>



### *D. Morse*

In a more recent case, the U.S. Supreme Court addressed student speech that took place outside of school grounds.<sup>45</sup> In *Morse v. Frederick*,<sup>46</sup> several students raised a banner that read “Bong Hits 4 Jesus” at a school-sponsored event that was held off-campus. The principal demanded that the students remove this banner and all but Frederick complied. The principal confiscated the banner and suspended Frederick who then sued.<sup>47</sup> The Supreme Court found for the school stating that a student cannot “stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.”<sup>48</sup> The Court explained that there is a “compelling interest” to ban the promotion of illegal drug use<sup>49</sup> and held in a 5-4 decision that “the First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.”<sup>50</sup>

### *E. The Current Focus of the Courts*

The majority of the courts today does not focus on the origin of speech and instead apply the *Tinker* substantial disruption test.<sup>51</sup> In *J.S. ex rel. H.S. v. Bethlehem Area School District*,<sup>52</sup> students created a website where they posted comments about their teacher such as “F—k you, Mrs. Fulmer. You are a Bitch. You are a Stupid Bitch,” and “Why Should She Die.”<sup>53</sup> On another website, there was a sketch of Mrs. Fulmer with her head cut off and blood dripping from her neck.<sup>54</sup> When Mrs. Fulmer saw these websites, she was unable to complete the school year and took a medical leave of absence for the following year. She testified that she suffers physically and emotionally as a result of what the students wrote about her on those websites. The Supreme Court of

Pennsylvania held that this type of substantial disruptive effect satisfies the *Tinker* test and justifies control of student speech.<sup>55</sup>

Then there is the more recent case of student speech outside school grounds, *J.C. ex rel. R.C. V. Beverly Hills Unified School District*,<sup>56</sup> where the plaintiff, J.C., posted a video on YouTube of C.C.'s friends calling her "spoiled" and a "slut" and mocking her for talking about "boners." In the video, J.C. also said that C.C. is "the ugliest piece of sh-t I've ever seen in my whole life." C.C. saw the video, printed out the comments and showed it to school officials, who suspended J.C. for 2 days. The Second Circuit said that in order for the school to establish substantial disruption, there needs to be more than "a mild distraction or curiosity created by the speech," but need not rise to the level of "complete chaos."<sup>57</sup> The fact that students talked about the video is not enough to satisfy the *Tinker* standard.<sup>58</sup>

Overall, it appears that the courts are reluctant to find that on or off-campus student speech has actually caused a substantial disruption because of the belief that the public is best served by a dissemination of ideas.<sup>59</sup> The main problem is that most courts use the *Tinker* standard in evaluating student speech even though *Tinker* was based on the students' free speech rights to express their opinions on controversial political issues.<sup>60</sup> The political speech in *Tinker*, though substantial disruption in certain circumstances, is different from the worthless cyberbullying speech intended to humiliate and offend others. The First Amendment should not be used as a shield to protect the cyberbullies' worthless speech, which does not rise to the level of the worthy speech assessed in *Tinker*.

### **III. BULLYING ON COLLEGE CAMPUSES**

Although bullying is a well-known problem in K-12 schools and in the workplace, little research exists on bullying

in college and university settings. Anecdotally, there is a growing concern among college and graduate school professors about the perceived increase in student “incivility, insubordination, and intimidation.”<sup>61</sup> Professors are being harassed, stalked, physically assaulted and even murdered. From 1993 to 1999, college and university professors experienced an average annual rate of 41,600 incidents of nonfatal workplace violence.<sup>62</sup> An article in the *Chronicle of Higher Education* provides the following examples:

- A chemistry professor at Virginia Tech asked his class how to solve an equation and a student in the back of the room shouted, “Who gives a sh-t?”
- When a professor at Utah State University refused to change a student’s grade, that student screamed at her, “Well, you goddamned bitch, I’m going to the department head, and he’ll straighten you out!”
- A historian at Washington State University was challenged to a fight when a student didn’t like the grade he received.<sup>63</sup>

Two recent studies confirm the anecdotal evidence about college bullying. The first study surveyed 1,025 undergraduate students and found that 33.4 percent of these students witnessed a student bully another student in college once or twice, 24.7% witnessed bullying occasionally, while 2.8% reported seeing it very frequently. Around 40% reported seeing a teacher bully a student while about 60% reported seeing a student bully another student in college.<sup>64</sup> The second study confirmed that although bullying does decrease as students matriculate, it doesn’t stop and that college students were more likely be bullied in college if they were bullied in elementary or high school.<sup>65</sup>

Since no independent cause of action exists for bullying in a college environment, students must rely on other grounds to challenge bullying. Bullying victims can file harassment claims under federal statutes, but these claims require a high standard of proof making it difficult for them to recover.<sup>66</sup> Finding colleges and universities liable for bullying is more challenging than similar actions against elementary and high schools because of the reduced control over students in a college environment. In general, tort actions based on bullying have been unsuccessful against colleges due to the courts' reluctance to impose special duties on colleges for students' safety.<sup>67</sup>

Plaintiffs have obtained some measure of success in suing K-12 schools for their failure to stop extreme bullying by pursuing tort theories with lower standards of proof.<sup>68</sup> Universities and colleges should be prepared for such suits to be filed against them.

#### *A. Protected Class Membership Suits*

Congress passed Title IX in 1972 primarily to assist women in gaining access to the same educational opportunities to which men traditionally had access. When Title IX was passed, it was uncertain as to whether it was intended to cover sexual harassment. This changed in the 1990s when the U.S. Supreme Court heard cases pertaining to sexual harassment and Title IX.

One of these cases was *Gebser v. Lago Vista Independent School District*,<sup>69</sup> in which an eighth grade student claimed that her teacher made sexually suggestive comments to her and to other female students. The teacher also fondled the student's breasts and engaged in sexual intercourse with her. The U.S. Supreme Court set out a two-part test for holding

schools liable under Title IX: (1) a school official with authority must have actual notice of the harassment; and (2) the school official must fail to adequately respond. In applying this standard to the facts of *Gebser*, the Court determined that school officials were aware of the teacher's sexually inappropriate comments to students and warned him about it but did not have actual notice of the teacher's sexual acts with the student; therefore, based on this lack of actual notice, the Court refused to find the school liable under Title IX for sexual harassment.<sup>70</sup>

In 1999, the U.S. Supreme Court heard another case involving Title IX and sexual harassment issues in *Davis v. Monroe County Board of Education*.<sup>71</sup> This case involved student-on-student sexual harassment, rather than teacher-on-student harassment. The student sued the school district, not for the other student's actions, but for the school's inaction in allowing the harassment to continue. During the 1999 school year, Davis, a female fifth-grade student endured continued verbal and physical harassment from a male classmate. This male classmate attempted to touch her breasts and genital area and rubbed up against her making comments such as "I want to feel your boobs" and "I want to get into bed with you." The student and her mother complained to school officials who took no action to stop the harassment. The harassment stopped when the male student was charged with sexual battery to which he plead guilty. The Court held because the harassment occurred during school hours and on school property, the misconduct was within the school's control.<sup>72</sup>

### *B. Non-Protected Class Membership Suits*

If a plaintiff is not a member of a protected class, the plaintiff may bring a lawsuit alleging a number of tort theories, such as negligence, negligent infliction of emotional distress

and intentional infliction of emotional distress.<sup>73</sup> The largest barrier to these actions is establishing that a college or university has a general duty to provide a safe learning environment. In general, no duty exists to keep a student safe from a third party and a majority of the courts have rejected the university-student relationship by itself as a basis for liability. The courts have also dismissed the custodian-charge relationship as establishing a duty since college students are adults who are able to take care of themselves.<sup>74</sup>

Some courts have found colleges to be liable for student injuries resulting from third party action when: (1) such behavior was reasonably foreseeable by the college;<sup>75</sup> (2) the college failed to investigate hazing incidents;<sup>76</sup> and (3) the college did not enforce its own hazing policy.<sup>77</sup>

Since college bullying cases remain a relatively new phenomenon, few published settlements or verdicts exist. Based on the hazing cases, colleges and universities may be held liable if courts can find a duty and a foreseeable injury. Student handbooks prohibiting bullying may provide the basis for that duty, but the victim would also have to prove that the college knew about the bullying.<sup>78</sup>

#### **IV. CONCLUSION**

While school bullying may not have received that much attention from a historical perspective, recent events have led policy-makers, researchers, the media and the general public to focus more attention on this growing problem.

In particular, cyberbullying is rising at a rapid rate and can no longer be treated as harmless playground behavior.

Unfortunately, under the current legal system, the courts appear to be reluctant to find that cyberbullying causes a substantial disruption in the school, except for a few extreme cases, because of the belief that the public is best served by a dissemination of ideas. The legal system needs to catch up with the times and realize that there is a difference between valuable political speech that is protected by the First Amendment and worthless cyberbullying speech that should not be protected by the First Amendment.

Generally, the victims of bullying at the college level tend to have fewer remedies available to them when compared to the victims of bullying at the elementary and secondary school levels. This is due to the fact that establishing a college's duty to its students is difficult in traditional tort actions as no duty exists based only on the college-to-student relationship.

Little research exists exploring the nature and frequency of college bullying; however, the more extensive research documenting the detrimental effects of bullying at the K-12 school levels warrants more investigation into college bullying.

Nevertheless, there are legal, social and psychological reasons as to why cyberbullying and college bullying should be more fully addressed. Recent cases indicate that the courts may be willing to reexamine their reluctance in finding colleges liable for injuries by third parties especially in cases where colleges exercise control and have undertaken a duty.

It is the legislatures' job to make the standards clear so that schools know the extent of their ability and authority to get involved and reprimand cyberbullying. Likewise, it is the job of the courts to provide guidance to ensure that students not

only retain their constitutional rights while on campus but also while in cyberspace. Finally, it is the job of the elementary, secondary and collegiate schools to develop a more multifaceted approach to bullying in order to foster an educational environment that is safe and respectful.

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<sup>1</sup> Kowalski v. Berkeley County Schools, 652 F.3d 565, 572 (4<sup>th</sup> Cir. 2011).

<sup>2</sup> JAMES C. HANKS, SCHOOL BULLYING (2012).

<sup>3</sup> See Dan Olweus, *Bullying at School: Basic Facts and Effects of a School Based Intervention Program*, 35 J. CHILD PSYCHOL. AND PSYCHIATRY 1171 (1994).

<sup>4</sup> See Sabaha Dracic, *Bullying and Peer Victimization*, 21 MATERIA SOCIO MEDICA 216 (2009).

<sup>5</sup> Bully, Official Site, <http://thebullyproject.com> (last accessed August 20, 2013); Information also available at [http://www.imdb.com/title/tt1682181/?ref\\_=fn\\_al\\_tt\\_2](http://www.imdb.com/title/tt1682181/?ref_=fn_al_tt_2) (last accessed August 20, 2013).

<sup>6</sup> See, e.g., Bullying Support Groups, <http://www.overcomebullying.org/Bullying-support-groups.html#LocalYouthSchoolBullying> (last accessed August 20, 2013); Dakarai I. Aarons, *Efforts to End Bullying, a Challenge to Leaders, Gain New Momentum*, EDUC. WK: SPOTLIGHT ON BULLYING, May 12, 2010; U.S. Dep't of Health and Human Services, [stopbullying.gov](http://www.stopbullying.gov/), <http://www.stopbullying.gov/> (last accessed August 20, 2013).

<sup>7</sup> Reports of bullying incidents at school are widespread. See, e.g., Michelle Nicks, WFMJ, *Wellsville Mother Speaks Out Against Bullying, After Son Tries to Take His Own Life* (Mar. 22, 2012), <http://www.wfmj.com/story/17234194/wellsville-mother-speak-out-against-bullying-after-son-tried-to-take-his-own-life>; Carrie Wood, *Bullying Incidents on the Rise in Lake Washington School District*, KIRKLAND REP., Feb. 24, 2010, available at <http://www.kirlandreporter.com/news/85094287.html>; Peter Schworm & Milton J. Valencia, *Anger Turns Toward Staff in Bullying Case*, BOSTON GLOBE, Mar. 31, 2010, available at [http://www.boston.com/news/local/massachusetts/articles/2010/03/31/anger\\_turns\\_toward\\_school\\_staff\\_in\\_bullying\\_case/](http://www.boston.com/news/local/massachusetts/articles/2010/03/31/anger_turns_toward_school_staff_in_bullying_case/). Such reports often involve lawsuits filed against schools. See e.g., Steve McConnell, *Bullying Federal Lawsuit Lodged Against Scranton School District Headed to*



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- Settlement Talks*, SCRANTON TIMES-TRIB., Mar. 23, 2012 available at <http://thetimes-tribune.com/news/bullying-federal-lawsuit-lodged-against-scranton-school-district-headed-to-settlement-talks-1.1289388#axzz1r0uyO78t>. The Tyler Clementi case received extensive media attention. See, e.g., Joseph Ax & Jessica Dye, Reuters, Rutgers Hate Crime Verdict Sends Anti-Bullying Message (Mar. 17, 2012) <http://www.reuters.com/article/2012/03/17us-crime-rutgers-analysis-idUSBRE82G04B20120317>. On celebrity campaigns, see John Mitchell, Popeater, Celebrities Team Up for Anti-Bullying Campaigns (Oct. 6, 2010), <http://www.popeater.com/2010/10/06/tim-gunn-ellen-degeneres-bullying-psa/>; JAMES C. HANKS, SCHOOL BULLYING (2012).
- <sup>8</sup> See Press Release, U.S. Dep't of Educ., U.S. Education Secretary to Keynote Department's First-Ever Bullying Summit: Partners Will Come Together to Develop a National Strategy for Reducing and Ending Bullying (Aug. 2010), available at <http://www.ed.gov/news/media-advisories/us-education-secretary-keynote-departments-first-ever-bullying-summit> (last accessed August 20, 2013).
- <sup>9</sup> President Obama and the First Lady, White House Conference on Bullying Prevention, WHITEHOUSE.GOV, Mar. 10, 2011, available at <http://www.whitehouse.gov/photos-and-video/video/2011/03/10/president-obama-first-lady-conference-bullying-prevention#transcript> (last accessed August 20, 2013).
- <sup>10</sup> U.S. Dep't of Health and Human Services, [stopbullying.gov](http://www.stopbullying.gov/), <http://www.stopbullying.gov/>; JAMES C. HANKS, SCHOOL BULLYING (2012).
- <sup>11</sup> Press Release, Josephson Inst., Ctr. For Youth Ethics, the Ethics of American Youth: 2010; Largest Study Ever Shows Half of All High School Students Were Bullies and Nearly Half Were the Victims of Bullying During Past Year (Oct. 26, 2010), available at [http://charactercounts.org/programs/reportcard/2010/installment01\\_report-card\\_bullying-youth-violence.html](http://charactercounts.org/programs/reportcard/2010/installment01_report-card_bullying-youth-violence.html) (last accessed August 20, 2013).
- <sup>12</sup> School Crime Supplement to the National Crime Victimization Survey (SCS/NCVS) Table 13, NATIONAL CENTER FOR EDUCATION STATISTICS (NCES), available at [http://nces.ed.gov/surveys/ssocs/tables/scs\\_2007\\_tab\\_13.asp?referrer=css](http://nces.ed.gov/surveys/ssocs/tables/scs_2007_tab_13.asp?referrer=css) (last accessed August 20, 2013).
- <sup>13</sup> Shaheen Shariff & Dianne Hoff, *Cyberbullying: Clarifying Legal Boundaries for School Supervision in Cyberspace*, 1 INT'L J. CYBER CRIMINOLOGY 76, 77 (2007).
- <sup>14</sup> Rick Hampson, Donna Leinwand & Mary Brophy Marcus, *Suicide Shows Need for Civility, Privacy Outline*, USA TODAY (Sept. 30, 2010).

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<sup>15</sup> Jamie Wolf, *The Playground Bully Has Gone Digital: The Dangers of Cyberbullying, The First Amendment Implications and the Necessary Responses*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 575 (2012),

<sup>16</sup> What is Cyberbullying?, Nat'l Crime Prevention Council, <http://www.npc.org/topics/cyberbullying/what-is-cyberbullying> (last accessed August 20, 2013).

<sup>17</sup> See Del Siegle, *Cyberbullying and Sexting: Technology Abuses of the 21<sup>st</sup> Century*, 33 GIFTED CHILD TODAY, Spring 2010, 14; Jaana Juvonen and Elishava Gross, *Extending the School Grounds? – Bullying Experiences in Cyberspace*, 78 SCHOOL HEALTH 496, 497 (2008).

<sup>18</sup> See Swearer et al. *What Can Be Done About School Bullying? Linking Research to Educational Practice*, 39 EDUC. RESEARCHER 38 (2010).

<sup>19</sup> Dinkes et al. Indicators of School Crime and Safety: 2009 40-42, NATIONAL CENTER FOR EDUCATION STATISTICS (NCES), available at <http://nces.ed.gov/pubs2010/2010012.pdf> (last accessed August 20, 2013); Samantha Neiman et al., *Bullying: A State of Affairs*, 41 JOURNAL OF LAW & EDUCATION 603 (2012).

<sup>20</sup> JAMES C. HANKS, SCHOOL BULLYING (2012).

<sup>21</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>22</sup> *Id.* at 504.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 506.

<sup>25</sup> *Id.* at 514.

<sup>26</sup> See *id.* at 513 (finding that “conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech”).

<sup>27</sup> *Bethel Sch. District v. Fraser*, 478 U.S. 675 (1986).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 678.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 679.

<sup>32</sup> *Id.* at 683.

<sup>33</sup> *Id.* at 685.

<sup>34</sup> *Id.* at 688.

<sup>35</sup> *Layshock v. Hermitage School District*, 650 F.3d 205 (3d Cir. 2011).

<sup>36</sup> *Id.* at 216.

<sup>37</sup> See *Saxe v. St. Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001).

<sup>38</sup> *Layshock v. Hermitage School District*, 650 F.3d at 217 n.17.

<sup>39</sup> *Hazelwood Sch. Dist. V. Kuhmeier*, 484 U.S. 260 (1988).

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 264.

<sup>42</sup> *Id.* at 263.

<sup>43</sup> *Id.* at 272-73.

<sup>44</sup> *Id.* at 271.

<sup>45</sup> *Morse v. Frederick*, 551 U.S. 393 (2007).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 398.

<sup>48</sup> *Id.* at 401.

<sup>49</sup> *Id.* at 407.

<sup>50</sup> *Id.* at 410.

<sup>51</sup> *See Stanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 970-71 (5<sup>th</sup> Cir 1972); *Beussink ex rell. Beussink v. Woodland R-IV Sch. Dist.*, 30 F.Supp 2d at 1189; *O.Z. v. Bd. of Trs. Of Long Beach Unified Sch. Dist.*, No. CV 08-5671, 2008 WL 4396895, at 4 (C.D. Cal. 2008).

<sup>52</sup> *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002).

<sup>53</sup> *Id.* at 851.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 858-859, 869.

<sup>56</sup> *J.C. ex. rel. R.C.*, 711 F. Supp. 2d at 1108.

<sup>57</sup> *Id.* at 1109.

<sup>58</sup> *Id.*; *See also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *J.S. v. Blue Mountain Sch. Dist.*, No. 3:07 CV 585, 2007 WL 954245 (M.D. Pa. Mar. 29, 2007). The courts provide conflicting decisions about what constitutes substantial disruption. In *Wisniewski ex rel. Wisniewski v. Board of Education*, a student inserted an icon next to his username where the teacher's head would fall off and blood would squirt out. *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d. Cir. 2007). In that case, the Court held that "there can be no doubt that the icon, once made known to the teacher or other school officials would foreseeably create a risk of substantial disruption." *Id.* But in *Mahaffey ex rel. Mahaffey v. Aldrich*, the Court found no substantial disruption from a website that instructed visitors on how to kill a person in a specific, gruesome fashion. *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 785 (E.D. Mich 2002).

<sup>59</sup> *Beussink ex re. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998); *Marcus v. Iowa Publ. Television*, 97 F.3d 1187, 1140-41 (8<sup>th</sup> Cir. 1996); *Elrod v. Burns*, 427 U.S. 347 (1976).

<sup>60</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>61</sup> *See Helen Smith et al., Violence on Campus: Practical Recommendations for Legal Educators*, OKLAHOMA CITY LAW REVIEW, Vol. 32, No. 3 442 (2007).

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<sup>62</sup> Detis J. Duhart, VIOLENCE IN THE WORKPLACE, BUREAU OF JUST. STAT. (December 2001, NCJ 190076), *available at* <http://www.bjs.gov/content/pub/pdf/vw99.pdf> (last accessed August 20, 2013).

<sup>63</sup> Alison Schneider, *Insubordination and Intimidation Signal the End of Decorum in Many Classrooms*, 44 THE CHRON. OF HIGHER EDUC., Mar. 27, 1998, at A12.

<sup>64</sup> See Mark S. Chapell, *Bullying in College by Students and Teachers*, 39 ADOLESCENCE 53, 56 (2004).

<sup>65</sup> See Mark S. Chapell et al., *Bullying in Elementary, High School and College*, 41 ADOLESCENCE 633, 633-34 (2006).

<sup>66</sup> See Kathleen Conn, *Bullying in K-12 Public Schools: Searching for Solutions*, Commonwealth Education Policy Institute (2006); Susan H. Duncan, *College Bullies – Precursor to Campus Violence: What Should Universities and College Administrators Know About The Law?*, 55 VILLANOVA LAW REVIEW 269 (2010) (noting that victims often rely on harassment actions as none of the current anti-bullying statutes provide private causes of action and anti-bullying statutes generally leave enforcement to the local Boards' discretion).

<sup>67</sup> *Marshall v. Cortland Enlarged City Sch. Dist.*, 697 N.Y.S.2d 395, 396 (N.Y. App. Div. 1999).

<sup>68</sup> See, *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1132 (9<sup>th</sup> Cir. 2003) (allowing plaintiff's sec. 1983 claim alleging sexual orientation discrimination to proceed); *Montgomery v. Indep. Sch. Dist. No. 709*, F.Supp.2d 1081, 1081 (D. Minn. 2000) (rejecting motion to dismiss plaintiff's sec. 1983 claim); *L.W. v. Toms River Reg'l Schs. Bd. of Educ.*, 915 A.2d 535, 548 (N.J. 2007) (rejecting deliberate indifference standard).

<sup>69</sup> *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998).

<sup>70</sup> *Id.*, at 277-79.

<sup>71</sup> *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

<sup>72</sup> *Id.*, at 632-36.

<sup>73</sup> Susan H. Duncan, *College Bullies – Precursor to Campus Violence: What Should Universities and College Administrators Know About The Law?*, 55 VILLANOVA LAW REVIEW 269 (2010)

<sup>74</sup> Robert D. Bickel and Peter F. Lake, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISK OF COLLEGE LIFE (1999).

<sup>75</sup> *Knoll v. Bd. of Regents*, 601 N.W.2d 757, 762 (Neb. 1999).

<sup>76</sup> *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1117 (La. Ct. App. 1999).

<sup>77</sup> *Furek v. Univ. of Del.*, 594 A.2d 506, 518 (Del. 1991).

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<sup>78</sup> Susan H. Duncan, *College Bullies – Precursor to Campus Violence: What Should Universities and College Administrators Know About The Law?*, 55 VILLANOVA LAW REVIEW 269 (2010)